No. 15,212

United States Court of Appeals

For the Ninth Circuit

MIKE ERCEG,
Appellant,

vs.

FAIRBANKS SCHOOL DISTRICT, SYLVIA RINGSTAD, D. H. DOXEY, GEORGE EDMONDSON and E. M. HUFFORD,
Appellees.

Appeal from the District Court for the District of Alaska, Fourth Division.

BRIEF FOR APPELLEES.

MAURICE T. JOHNSON,
Chena Building, Fairbanks, Alaska,
Attorney for Appellee Fairbanks School District.

Of Counsel:
HARRY O. AREND,
P. O. Box 468, Fairbanks, Alaska,
Attorney for Appellees Sylvia Ringstad and D. H. Doxey,
RALPH J. RIVERS,
P. O. Box 1951, Fairbanks, Alaska,
Attorney for Appellees, George Edmondson and E. M. Hufford.

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STATEMENT OF CASE.

The complaint (Tr. 3-13), filed by the Appellant on April 4, 1956, alleges that the Appellant is the owner of certain mining ground located within the boundaries of the Fairbanks School District.

It alleges that the Fairbanks School District is an independent school district corporation organized under the laws of the Territory of Alaska and having the power to tax real and personal property situated in the District.

It alleges that certain valuations were placed upon mining claims owned by the Appellant for the years

1949 and 1950, and for the years 1951, 1952, and 1953, but not that these valuations were different from those placed on all other mining claims in the District.

It alleges that certain claims were sold by the School District at public auction for the payment of taxes, interest, penalty and advertising, at various public sales. The complaint does not allege, however, that the tax sales held by the School District were in any way invalid or not in accordance with the law.

The Complaint alleges that the Appellees, Fairbanks School District, placed certain valuations on mining claims; however, there is no allegation anywhere to show that these valuations were in any way peculiar to the mining claims of the Appellant, and the Complaint says that the valuations fixed applied to all mining ground located within the District and not only to that of the Appellant.

In Paragraph 9, the Appellant says that the assessment of his mining claims was made arbitrarily and capriciously; however, he fails entirely to allege that his ground was assessed or valued in any manner other than the uniform rate which applied on all mining ground within the District. Nowhere does the Complaint allege compliance with Section 16-1-124, Alaska Compiled Laws Annotated, 1949, or compliance with Section 16-1-131, Alaska Compiled Laws Annotated, 1949.

The Complaint prayed that the assessment and valuation of Appellant's property be declared illegal and void; that the tax sales be set aside; that the taxes were illegally collected; that the assessments were

illegally made; and that the Appellant be restored to full possession and enjoyment of his property; and that the Appellant have judgment against the School District and for costs and fees.

To this Complaint the Appellee, Fairbanks School District, filed a Motion to Dismiss under provisions of Rule 12(b), Federal Rules of Civil Procedure, 28 USCA, upon the ground that the Complaint failed to state a claim upon which relief could be granted because: (a) the Appellant had failed to comply with the provisions of Section 16-1-124, ACLA 1949 and (b) that the Appellant had failed to comply with the provisions of Section 16-1-131 ACLA 1949. This motion was joined in by the Appellees Sylvia Ringstad, D. H. Doxey, George Edmondson, and E. M. Hufford.

This Motion was granted and the action was ordered dismissed on May 29, 1956, by an order of the District Court, Fourth Judicial Division, District of Alaska. After the entry of this Order, the Appellant made no attempt to amend his Complaint to show compliance with Alaska Law, and it is believed that the Appellant elected to stand upon his original Complaint in taking this Appeal, because the Appellant would be unable to allege and prove compliance with applicable Alaska Law.

The applicable Alaska statutes are as follows:

> Section 16-1-124, ACLA 1949. *Objections to assessment, tax or order for sale: Form and contents: Hearing: Evidence: Decision and Relief; Costs.* Any person owning, or having any legal or equitable interest in, or a lien upon any tract

listed in said duplicate delinquent roll, may appear and present at the time of hearing before the court, his objection to, and contest the validity of the assessment or tax on such property, or the granting of the order of sale thereof. Such objection shall be in writing and specify the grounds of objection to the assessment or tax on the particular tract represented in such objection and the court will hear and determine such objection and render such decision thereon as may be legal and just. At such hearing the duplicate tax roll shall be prima facie evidence of the regularity and legality of the assessment and levy of the tax and that the same is unpaid, and no objection to the valuation of the property, the manner of the assessment and levy of the tax, or any of the subsequent proceedings shall be entertained by the court which does not effect the substantial rights of the party interposing the objection. If at such hearing the court shall find any tract to be over valued, or over assessed, the same shall be adjusted on equitable principles so that the same shall bear its just proportion of the levy, and the invalidity of the tax on any one tract shall not be considered as a presumption of the illegality of the tax on any other tract. Provided, however, that if the court shall find that the assessment of the value of the property of the party objecting was so high in proportion to other property assessed as to satisfy the court that the city council in equalizing the assessment had acted in bad faith, the entire tax of the objecting party shall be held void, and the costs shall be taxed against the city. If the court find that the assessment was fairly made and equalized according to law, the tax duly levied and not paid when due

and due notice given of the hearing as provided herein, it will be sufficient to authorize the issuance of the order of sale. Provided that where on account of objections filed and hearing had the court may enter judgment against and order sale of all property to the tax on which no objection is made before the determination of the subjects in controversy. (L 1923, ch 97, sec 76, p 227; CLA 1933, sec 2443).

Section 16-1-131, ACLA 1949. *Action or proceedings to recover lands sold for taxes: Tender or payment into court of taxes, penalty, interest and costs.* In any action, suit, or proceeding for the recovery of lands sold for taxes under the provisions of this act, except the taxes have been paid or the lands redeemed as herein provided, the party claiming to be the owner against the holder of the tax title must with his complaint or answer tender and pay into court the amount of taxes for the payment of which the lands were sold, and penalty and interest and costs of sale, and interest from the date of sale at the rate of fifteen per cent per annum to the date of the tax deed or certificate and also any taxes the grantee in said tax deed or certificate, or the purchaser, may have paid on said lands, with interest thereon at the rate of twelve per cent per annum from the date of such payment to the date of the filing of his complaint or answer, the said sum to be for the benefit of the holder of the tax title in case the same should fail in such suit, action or proceeding and the court shall not consider any complaint, answer or other pleading until such tender or payment shall have been made. (L 1923, ch 97, sec 83, p 232; CLA 1933, sec 2450).

Section 37-3-54, ACLA 1949. *Lien and liability for taxes: Enforcement: Board to have taxing powers and duties of council: Refunds.* All taxes levied and assessed by the school board under this article shall be a lien upon the property assessed and such lien shall be prior and paramount to all other liens and encumbrances, and may be foreclosed by an appropriate action in any court of competent jurisdiction. The owner of the property assessed shall be personally liable for the amount of taxes assessed against such property; and such taxes, together with penalties and interest, may be collected after the same has become due, in a personal action brought in the name of the school district against such owner in any court of competent jurisdiction. Provided: that the school boards in independent school districts in the levy and collection of taxes shall have all of the powers and duties given to the common council of municipal corporations and the laws relative to the levy and collection of taxes in municipal corporations are hereby extended to Independent School Districts.

Further provided: That all provisions in Sections 1331 to 1336 inclusive, Compiled Laws of Alaska 1933 (Secs. 37-3-61-37-3-66 herein), requiring refunds of Territorial money to cities and incorporated school districts, and establishing procedures therefor, are hereby made applicable to Independent School Districts. (L 1935, ch 77, sec 14, p 163, am L Ex Sess 1946, ch 7, sec 2, p 46, effective March 29, 1946.)

ARGUMENT.

Under the provisions of Section 16-1-124, ACLA 1949, it is provided that any person owning, or having any legal or equitable interest in, or a lien upon any tract listed in the duplicate delinquent roll, may appear and present at the time of the hearing before the court his objection to, and contest the validity of the assessment or tax on such property at which time the court would conduct a hearing as to the validity of such tax or assessment. The complaint is silent as to any such allegation, although the complaint refers to delinquent tax sales which were held for the years 1949 through 1954. Consequently, before the Appellant could state a valid claim, he must first show that he exhausted the remedies provided by law. This the Appellant wholly failed to do. On the ground of public policy the law discourages suits for the purpose of recovering back taxes alleged to be illegally levied and collected. 51 *Am. Jur.* page 1005, sec. 1167.

Section 16-1-131, ACLA 1949, provides that in any action, suit, or proceeding for the recovery of lands sold for taxes, the party claiming to be the owner must with his complaint tender and pay into the court the amount of taxes for which the lands were sold, together with penalty, interest costs of sale, interest from the date of sale at fifteen per cent per annum to the date of the tax deed or certificate; and also any subsequent taxes paid on said lands with interest at twelve per cent per annum. The appellant failed to make such tender and payment into court. Therefore, the court could not consider the complaint

as filed. Since the statutes quoted were in existence at the time suit was filed, any remedy which the Appellant had must be exercised in the manner provided by the statute. In the absence of fraud, the courts can give relief of erroneous judgment of taxes assessed only in the manner and under such conditions as are prescribed by statute. 51 *Am. Jur.,* page 1006, sec. 1168, cases cited.

When a taxpayer claims that real estate is assessed too high, he should first apply for relief to the Board of Equalization of the School District and if denied, should seek relief through the courts in the manner prescribed. *Homan v. Board of Equalization,* Boone County, Nebr. 1942, 3 N.W. 2d p. 650.

Section 78, Title 48, USCA, is permissive with reference to mining claims and says they "may be valued at a price paid the United States therefor, or at a flat rate fixed by the legislature".

This section also provides that all taxes shall be uniform upon the same class of subjects, and shall be levied and collected under general laws.

Cities and school districts in Alaska are permitted to levy and collect taxes under the general power contained in Section 37-3-54, ACLA 1949. Under the terms of this latter section, the above-mentioned Sections 16-1-124 and 16-1-131 are a part of the taxing authority and power delegated to school districts, of which the Appellee Fairbanks School District is one.

When the Alaska Legislature passed the General Property Tax Law known as Chapter 10, Session Laws

of Alaska, 1949, it provided in Section 4 that taxes levied under the provisions of Chapter 10 on property within the limits of an independent school district should be assessed, collected, and enforced in the manner prescribed by the Property Tax Law of the School District. As will be seen from the Complaint, the Fairbanks School District did not elect to collect any tax under Chapter 10, SLA 1949, but continued collection of taxes under the general authority of Sec. 37-3-54, ACLA 1949 as amended. Chapter 10, SLA 1949 was a separate and distinct act from Sec. 37-3-54, ACLA 1949, and Chapter 10 did not amend, repeal, or in any way change the authority granted in Sec. 37-3-54. Since that time, Sec. 10, SLA 1949 has been repealed by the Legislature. In *Hess v. Mullaney,* 213 Fed. 2d p. 635, this honorable Court said "Attention is called to the fact that Chapter 10 SLA 1949 provides no machinery by which the levy and collection of the one per cent tax by the cities and districts could be enforced or compelled."

Practically all authorities are to the effect that assessors, in valuing property for taxation, may take into consideration the fact that it contains undeveloped minerals in such quantity as to enhance the value of the land over its mere surface value. Minerals in place are not rendered non-taxable merely because of lack of legislative method and regulation for determining their value. Accordingly, an added value may be given real estate for purposes of taxation where there is sufficient reason to believe that the property contains mineral deposits in sufficient quantity to give

it a value as a prospective mine. 51 *Am. Jur.,* page 656, sec. 707.

The broad principal that in the absence of fraudulent or arbitrary conclusion on the part of the assessing officers and assessor or disproportionate valuation for tax purposes of particular property, or particular classes of property, the assessment is not invalid, has frequently been stated and recognized. *Orient Ins. Co. v. Board of Assessors,* 221 U.S. 358. The complaint alleged that all classes of property, including real estate and mining claims, were assessed uniformly and on the same basis. Consequently, this method of assessment was not fraudulent and the taxes levied are not invalid. 51 *Am. Jur.,* page 666, sec. 723.

All presumptions are in favor of the correctness of tax assessments. The good faith of tax assessors and the validity of their actions are presumed. 51 *Am. Jur.,* page 620, sec. 655.

An examination of the authorities cited in Appellant's Brief fails to disclose any support for the theory that the requirements of Alaska laws may be waived or set aside. In fact, most of the authorities cited point out that the power of taxation is an essential and inherent attribute of sovereignty belonging as a matter of right to every independent government so long as tax legislation in form and substance conforms to the Organic Act and is confined to the enactment of what is in its nature strictly a tax law. The legislation is the supreme authority and courts as well as all others must obey.

That taxes appear to seem unjust and even unnecessary does not constitute a reason for judicial interference. The provisions of the Organic Act, Sec. 48-1-1, ACLA 1949, requiring uniformity of all taxes, requires only that the same means and methods be applied impartially to all constituents of each class so that it operates equally and uniformly upon all persons and corporations in similar circumstances. The due-process-of-law clause of the Federal Constitution has no application to ad valorem taxation except as to procedural questions. This position is amply supported by the Supreme Court of Colorado in the case of *City and County of Denver v. Lewin,* 105 Pac. 2d 854, cited by Appellant on page 7 of his Brief.

The burden of establishing that a particular valuation for tax purposes is excessive, unequal, or disproportionate is upon the taxpayer, and under our statute, Sections 16-1-124 and 16-1-131, Appellant has wholly failed to allege compliance with the law prior to bringing suit. 51 *Am. Jur.,* page 668, sec. 726.

It has been held that where a statute prescribes a method for review and reduction of excessive valuation of taxes, the remedy must be availed of within the prescribed period; and one not availing thereof in time cannot attack the assessment as depriving him of property without due process of law.

The assessments were in fact made by the officials charged with that duty under the statute; if excessive, there was an opportunity for review and correction which the Appellant did not take. *Rogers v. Hennepin,* 240 U.S. 184; *Orient Ins. Co. v. Board of As-*

sessors for Parish of Orleans, 221 U.S. 358, and *Standard Oil Co. v. McLaughlin* (9th Cir.) 67 Fed. 2d 116.

CONCLUSION.

For the reasons stated, it is abundantly clear that the judgment of dismissal of the action by the District Court, Fourth Judicial Division, District of Alaska, is correct and should be affirmed.

Dated, Fairbanks, Alaska,
January 4, 1957.

Respectfully submitted,
MAURICE T. JOHNSON,
Attorney for Appellee Fairbanks School District.

Of Counsel:
HARRY O. AREND,
Attorney for Appellees Sylvia Ringstad and D. H. Doxey,
RALPH J. RIVERS,
Attorney for Appellees, George Edmondson and E. M. Hufford.